Supreme Court of the United States

No. 527—October Term, 1961

ROBERT V. RAFTER,

Appellant,

against

THE HON. ARON STEUER, Justice of the Supreme Court,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS FOR WANT OF JURISDICTION

Appellee in the above entitled matter moves to dismiss the appeal herein on the ground that the Court lacks jurisdiction to hear the appeal in that the appellant has not taken proper steps to secure from the highest court of New York State a decision on the merits of the cause; and on the further ground that the appeal presents no substantial federal question; and further that the appeal was not docketed in this Court within the time therefor.

Statement

This proceeding was originally commenced, pursuant to the provisions of New York Civil Practice Act, Article 78, to compel the appellee herein to sign an order and to "enjoin the obstruction of justice" by certain other per-

sons named by respondents. The jurisdictional statement recites (p. 4) that these other individuals neither appeared nor answered. The proceeding was within the original jurisdiction of the Appellate Division of the New York Supreme Court, First Department, and was properly begun in that Court.

The appellee moved to dismiss the petition, and the motion was unanimously granted by order entered November 29, 1960. 12 A. D. 2d 484. The appellant herein thereupon appealed to the New York Court of Appeals. Appellee moved to dismiss that appeal on the grounds that it was improperly taken as of right since no substantial constitutional question was directly involved. This motion was granted by order entered February 23, 1961. 9 N. Y. 2d 759.

Instead of *seeking leave to appeal* to the Court of Appeals, the established remedy where an appeal as of right does not lie, appellant appealed to this Court, alleging a deprivation of property without due process of law, in violation of the provisions of the United States Constitution. The Notice of Appeal to this Court was filed on or about May 24, 1961.

POINT I

The case is not properly within the jurisdiction of this Court since no final decision on the merits has been obtained from the highest court in New York, and further the case presents no substantial constitutional question.

We submit that this Court lacks jurisdiction of this appeal because the appellant has not taken the proper steps to obtain a judgment of the highest state court finally

determining the case *on the merits*, and on the further ground that the case fails to present a substantial federal constitutional question.

Appeals to the New York Court of Appeals are governed by Civil Practice Act, §§ 588 and 589. Section 588 provides, in part, that an appeal *as of right* may be taken to the Court of Appeals from a final unanimous judgment or order of the Appellate Division only if there is directly involved the construction of the state or federal constitution, or from a judgment of a court of original jurisdiction where the *only* question involved on appeal is the validity of a state or federal statute under the state or federal constitution.

Appeals which do not lie as of right, pursuant to § 588, come within the provision of § 589. That section provides that in all other cases, appeal to the Court of Appeals may be by permission of either the Appellate Division or of the Court of Appeals.

In the instant case the appeal as of right was dismissed on the ground that no substantial constitutional question was directly involved. Civil Practice Act, § 592, provides that in the event of dismissal of an appeal as of right the appellant may still proceed to move for permission to appeal pursuant to § 589. This the appellant herein failed to do. Therefore, the decision of the Court of Appeals dismissing his appeal as of right did not finally determine the case in the highest state court upon the merits but left available an appeal by permission, a remedy which the appellant failed to pursue.

Appellant herein contends that a proper construction of the law requires the right of direct appeal to the Court of Appeals from *all* proceedings originating in the Appellate Division. This has never been the law of New York.

In *Matter of Mathot* (222 N. Y. 8 [1917]) the Court considered a motion to dismiss an appeal taken as of right in a disbarment proceeding originating in the Appellate Division, First Department. In granting the motion to dismiss the appeal, the Court held that only an appeal by permission would lie, the case not falling within one of the statutory provisions authorizing an appeal as of right. (See, also, *Matter of Lehman*, 264 N. Y. 462 [1934]; and *Matter of Bakerman*, 295 N. Y. 811 [1946].)

Proceedings for admission of attorneys to practice before the courts of New York originate in the Appellate Division. In *Matter of Peters* (257 N. Y. 552 [1931]), an appeal as of right, from an order of the Appellate Division rejecting an application for certification for admission to the bar, was dismissed. (See, also, *Matter of Morrell*, 297 N. Y. 718 [1947].)

An authoritative work on the jurisdiction of the Court of Appeals (Cohen & Karger, *Powers of the New York Court of Appeals*) has stated the rule as follows (§ 51, p. 231):

> "Since appeal of right from final determinations of the Appellate Division is limited to cases where there has been a dissent, reversal or modification or where a constitutional question is directly involved, it is clear that *there can generally be no appeal of right from a determination originating in the Appellate Division* unless there is a dissent, or a constitutional question directly involved; for obviously there can ordinarily be neither reversal nor modification in such a case." (Italics ours.)

Appellant further contends that even if a correct construction of the statute results in a denial of the right of appeal to the Court of Appeals, such a construction is offensive to due process.

The right of the States to determine their own court procedures, including the basis for appeal, has long been recognized by this Court.

In *John* v. *Paullin* (231 U. S. 583 [1913]), in construing appeal rights under an Illinios statute, this Court held (p. 585):

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reversed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly, no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the State law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Later in the opinion the Court further emphasized this holding (p. 587):

> "As particularly apposite, we quote the following from the opinion in *Newman* v. *Gates, supra* [204 U. S. 89 (1907)], a case in which this court declined to review a like judgment of dismissal by a state court:
>
> 'Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon

> the due faith and credit clause of the constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such a question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.' "

When the above decision is applied to the instant case, it is manifest that the appellant has failed to follow the statutory procedures for appeal to the highest court of New York, and that no final judgment or decree, deciding a federal question *on the merits*, has ever been rendered by the New York Court of Appeals. It is as if no appeal had been prosecuted from the order of the Appellate Division. Hence this Court has no jurisdiction to hear the appeal. (See, also, *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 214 U. S. 191 [1909]; *Central Union Co.* v. *Edwardsville*, 269 U. S. 190 [1925]; and *Parker* v. *Illinois*, 333 U. S. 571 [1948].)

The issues presented by this appeal as to state appellate practice having been previously determined by this Court against the appellant, not only is jurisdiction wanting but there is also absent any substantial federal question.

POINT II

The case was not docketed within the time set therefor by the rules of this Court.

The Notice of Appeal herein was filed on or about May 24, 1961. The case was docketed in this Court on October 31, 1961.

Rule 13 of the Rules of this Court provides that the appellant must docket the case not more than sixty days after the filing of the Notice of Appeal. The time for so filing not having been enlarged by order of a Justice of this Court or by any other court, the appeal has not been docketed in time.

CONCLUSION

The appeal herein should be dismissed for lack of jurisdiction to hear the appeal, on the ground that no substantial federal question is presented, and further on the ground that the appeal was not filed in time.

Dated November 3, 1961.

Respectfully submitted,

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